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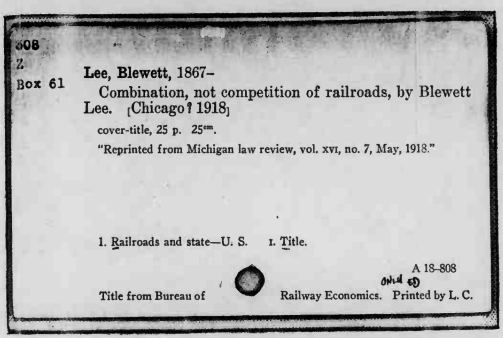

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COMBINATION, NOT COMPETITION OF RAILROADS

BY
BLEWETT LEE

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COMBINATION, NOT COMPETITION, OF RAILROADS.

IN the course of the taking of evidence before what is generally called the Newlands Committee, appointed by Congress to investigate conditions relating to interstate and foreign commerce, it was very interesting to observe the personality of the different members of the Committee, as indicated by the questions which they asked of the various expert witnesses who were brought before them. The keen intellect of the Senior Senator from Iowa has continually played about the problem, how the revenues of the weak lines can be increased without at the same time increasing those of the strong ones. Assuming that some of the lines are already earning enough, but some are not, how shall the poor lines be made prosperous without increasing the earnings of their strong competitors? Shall the Government guarantee the earnings of the weak lines? If so, how will it ever get its money back? Can the strong lines be made to shoulder the weak ones, so to speak, or dilute their own prosperity by spreading it over the adversity of their weaker brethren? On more than one occasion the Senator has declared this problem to be insoluble. What is to be done?

It may be remarked at the outset that the idea that the earnings of the strong lines must be kept down at all events, is far from comforting to people who have invested their money in the railroad business, and most discouraging to those who are invited to invest new money in it.

In one of the recent Treasury Decisions, Honorable David A. Gates had occasion to remark that unless a public utility like a railroad company earned eight per cent. upon its investment, its stock could not be kept at par—a conclusion which was reached from an examination of many income tax schedules. In an investigation made in connection with the Fifteen Per Cent. Rate Case, the Illinois Central Railroad Company discovered that in the unusually prosperous year ending June 30, 1916, it had in fact received a return on its investment in road and equipment of only 4.3%. The opinion of the Interstate Commerce Commission in this case shows that, taking the railroads of the country as a whole, the return for this same most prosperous year for the carriers in the Eastern District was 6.64%, Southern District 5.26%, and the Western District 5.43% The net operating income for 1916 is the largest which the railroads have ever had, and was more than $1,000,000,000.00, but it was less than 6% upon the value of the railroad property devoted to

the use of the public. The increased operating expenses for 1917 have caused a very considerable recession since that time.

During the year 1916, not a single share of new railroad stock was listed on the New York stock exchange, or sold to the public, for new railroad building. It is generally agreed that at least one billion dollars each year ought to be spent in increasing the railroad facilities in the United States. This sum has to be borrowed from investors, and, under the circumstances, they can hardly be blamed for putting their money into something else, and this is, in fact, what they are doing. The transactions of the New York Stock Exchange indicate that practically no new railroad securities are being bought, and that such financing as railroads have done recently is of a purely temporary character by the issue of short term notes.

Even if a scheme could be invented by which the earnings of the proud might be humbled, and the earnings of those of low degree raised up in the railroad world, it would be very ill advised to put it into effect at a time when the railroads of the country are not adequate to furnish the transportation facilities needed by business. Additional sums will have to be borrowed in order to make the railroads adequate to serve the business of the country. Congress has by its laws created a situation where the rates charged must be the same over all competing lines, for if they are different the line with the low rate will get all the business. Since the rates are published, other lines have no difficulty in immediately making the same rate. Under these circumstances, the only competition possible is in convenience of facilities and in quality of service. This sort of competition, however, is very limited for the reason that the older lines first on the ground have obtained facilities which the younger lines can never possibly hope to duplicate, and they have reached a financial status which is likely always to keep them at the front, so far as quality of service is concerned. It ought also to be remarked that this competition at competitive points in very special facilities and expedited service is really to the disadvantage of the non-competitive points. The town upon only one railroad is tied to the disadvantage of having but one railroad instead of more, and if, at a competitive point, the facilities are multiplied and services expedited on account of competition, obviously the advantage in favor of the competitive point is made greater than ever. The policy of the country ought not to be to increase the lead of the strong towns over the weak ones.

A natural and wholesome economic process which would be to the advantage of the people of the whole country has been balked and practically brought to an end by the application to the railroads of

what is popularly known as the Sherman Act, and by the anti-trust laws of the several States. These statutes were passed upon the idea that the principles of competition applicable to business generally, govern also in the case of railroads, wholly overlooking the essentially monopolistic character of the railroad business. One readily recognizes that the way-stations each upon only one railroad have to do business with a monopoly. Even at competitive points, the railroads are still monopolistic, and whenever they are compelled by law to do business anywhere upon the same terms, the situation of monopoly becomes almost as complete there as at the way-stations. The statutes which compel railroad companies to publish their rates and practices, and everything which they do for the benefit of the shippers, by compelling railroads to do business upon the very same terms, have put the shipping public everywhere in the situation that they are dealing with a monopoly. Under these circumstances the American people have been intelligent to substitute regulation instead of competition. Rates and facilities are now subjected to the control of the Interstate Commerce Commission and the various State Commissions. Notwithstanding this, however, the statutes which were framed on the idea of forcing the railroads to compete, and which prevent acquisition of the weak lines by the strong ones, especially if they should be parallel or competing, are still on the statute books and actually compel the weak lines to remain indefinitely incapable of earning money for their owners or giving adequate service to the public.

Is there any way to make the weak lines strong? Yes, a very simple one. Let the strong lines buy the weak ones, and in this way only the strong lines would be left. This is the situation which already exists in France, and is rapidly coming to pass in England. Undoubtedly the strong lines which have already control of great traffic by using the weaker lines for feeders and cut-offs, can make more money out of them than anyone else, and the country will be better served by having the railroads in strong hands than in hands which are financially feeble and unable to develop the country. Wherever it has not been interfered with, the process of consolidation of weak lines into strong ones has gone on and has, on the whole, been of great benefit to the public, but this movement also has practically come to a stop in the United States. Statutes block the way.

The situation in France is in some respects a very interesting one. The following quotation is taken from the "Historical Sketch of Government Ownership of Railroads in Foreign Countries" by the

distinguished English expert on railroads, W. M. Acworth, presented to the Joint Committee of Congress on Interstate Commerce.[1]

> "On 1st January, 1909, the Government by taking over one of the six great systems—the Western—upset the symmetry of the original plan. But with this exception, throughout the whole history the original plan has stood firm. The whole country was divided up among six great companies, five of which radiate from Paris, and the sixth, the Midi, serves the extreme South and Southwest. The development of the railway net work has been systematic from the outset; trunk lines first, then important branches, then the less important ones, and finally in recent years a considerable development of light secondary lines. Throughout, the State has guided, subsidized and controlled. Each company has a monopoly of its own district. So far as possible, the points where the great systems meet are arranged,—not, as in Holland, or formerly in Italy, at the great towns—but precisely at the points of least importance from a traffic standpoint. Where traffic is unavoidably competitive, as for instance from Paris to Central Switzerland, which can be reached either by the Eastern or by the Paris and Lyons railway, arrangements are deliberately made to prevent competition. The Government controls all rates and fares charged and all services given, and the Government approves, not merely of pools, but of agreements by which shippers attempting to consign traffic by the route by which railway companies have agreed the traffic shall not flow, are deliberately penalized by higher rates."

Under this arrangement, as Mr. Acworth points out,[2] down to the time the State took over the Western Railway of France in 1909, the French companies had an operating ratio seven or eight per cent. lower than that of the Prussian State Railways, which have been regarded as models of successful government ownership.

In the January, 1917, number of the Edinburgh Review appears an article on the future of railways in England, in which the author evidently a very competent critic, concludes that, having seen the advantages of the system of operation since the beginning of the present war, by which all competition is ended, England is unlikely ever to return to a competitive situation, so far as the railways are concerned. The plan which prevails in France of having all the railroads in a particular section combine, so as to operate upon the most economical basis, is recommended. The author is opposed to Government ownership, because the railroads would corrupt politics, and politics would corrupt the railroads. He calls attention to the classical instance of Belgium in June, 1912, when, in order to carry an election, the Minister of Railways, the day before the election occurred, raised the salaries of certain classes of railway workers for six months back, and paid the money that very day. Before this took place, the election had been doubtful, but the next day the Ministry was triumphantly returned to power. The author also recommends that the Government should by purchase become a stockholder in all the railways to such an extent as to secure representation upon the Boards of Directors.

[1] Page 19.
[2] Page 34.

The following statement is quoted fom Sir Herbert Walker, Chairman of the British Railway Executive Committee:[3]

> "I cannot think that our railways will ever revert to the independent and foolish competitive system which obtained before this war broke out. The old system possessed manifold evils, not the least being the wastefulness of competition; the lack of standardization; the thousand and one intricate and time-engaging processes necessary on each line owing to rivalry with others in ways that never ought to have been allowed. If we are to get the really useful and tangible result of what has been done in the war—if we are to prove that the experience gained has been beneficial—there must be vastly more co-ordination between the various lines and companies. Overlapping must cease, and waste of material, stock, man power and energy must be done away with."

An interesting phase of the recent situation in England is that communities are required to be served with coal from the nearest available mines, and in this way long hauls upon coal traffic are avoided and a great saving is made in the amount and consequent expense of transportation. Obviously, under the existing laws our railroad companies would have had no way of preventing cross-hauls, at least prior to the taking over of the railroads by the President under the War Power, however beneficent and economical. It is said that upon the New York, New Haven & Hartford Railroad sometimes a train of bananas from New York bound for Boston has met a train of bananas moving from Boston to New York. This means only that the New York broker has found Boston customers,

[3] *Railway Review*, August 4, 1917, p. 150.

and the Boston broker has found New York customers, but the result is a pure waste of transportation. From the point of view of the railroads, this transportation is not wasted since it is all paid for, but from the point of view of the country there should be as little of it as possible. A similar waste arises when freight is hauled over a round-about route, instead of a direct one. Under existing laws, however, the railroads could not by agreement prevent this, even if so disposed. Under an amendment to the Interstate Commerce Act, the shipper also has the right to route the freight, and it is the duty of the railroads to obey his directions.[4]

It has turned out very unfortunate now that the railroads are fully regulated, that the prohibitions against the pooling of traffic still remain. The pooling of equipment has been found by actual experience to be economical and in the public interest; the pooling of passenger train service would undoubtedly lead to the public being much more conveniently served at a considerable reduction in expense; while the pooling of freight traffic could be made a great economy by sending freight over the cheapest lines. Pooling of any kind should be under Governmental supervision, but there is no lifficulty whatever in fully protecting the public interest by the various regulating bodies. Economies of this kind are almost entirely forbidden by the anti-trust laws of today. As we shall see later, the operation of all the railroads in the country by the Railroad War Board as if they were one continental system, demonstrated that the public has really everything to gain and nothing to lose by such an arrangement. Under normal conditions the great systems naturally prefer that pooling should be prohibited, for it protects them against the construction of new lines, built to share in the pools.

Section 5 of the Interstate Commerce Act[5] prohibits railroads pooling freights or earnings. It has proved entirely adequate. Section 11 of the Clayton Act[6] confers upon the Interstate Commerce Commission authority to enforce compliance with sections 2, 3, 7 and 8 of that Statute. Of these sections, section 7 is the one which provides in regard to the acquisition by one corporation of the stock of another. This jurisdiction of the Commission is concurrent, however, with that of the District Courts of the United States, (Section 15), so that the new legislation is only partly constructive. Indeed, the chief present restriction upon the acquisition on the stock of one railroad by another will be found in this Section 7 of the Clayton

[4] Sec. 15, Par. 4: U. S. Comp. Stat. Ann. (1916), § 8683 (5).
[5] U. S. Comp. Stat. Ann. (1916), § 8567.
[6] *Ib.* 8835i; 38 Stat. 734.

Act of October 15, 1914, c. 323, the act entitled, "An Act to Supplement an Act to protect trade and commerce against unlawful restraints and monopolies," by which the distinction is made to turn upon whether or not the acquisition by one railroad company of the stock of another *may be substantially* to lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition. Under the words "may be" and "substantially" practically every case would go to a jury, and since, under Section 14, a violation of the Act on the part of any individual directors, officers or agents of such corporation, carries with it a fine of not to exceed $5,000.00 or imprisonment not to exceed one year, or both, no one cares to undergo the risk of buying another railroad, since how to predict what a jury will do under the circumstances is one of those things which, as remarked by Lord Dundreary, "No fellow ever can find out." In short, it is perfectly safe for a railroad company never to buy any other railroad, and it is more or less dangerous for any railroad company to buy another railroad, a state of affairs which dooms the country indefinitely to being badly served by weak and insignificant lines, which can never really render adequate service, unless they fall into strong hands. The purchase of a railroad will turn upon such questions as whether or not the Attorney General wants to run for Governor. The obvious remedy for the situation is to have the decision of the Interstate Commerce Commission made conclusive of the legality of each proposed purchase, for their fidelity to the public interest admits of no question, and their competence can hardly be challenged.

The leading cases holding that the Sherman Anti-Trust Law of July 2, 1890, applied to railroad companies, were:

Trans-Missouri Freight Association Cases, (1897), 166 U. S. 290.
Joint Traffic Association Cases, (1898), 171 U. S. 505.

In the first case the decision was rendered by a bare majority of the court, in the face of a very vigorous dissent. In the second case, the decision was rendered by five judges, three dissenting, and one taking no part in the decision of the case. If the cases had come before the court for the first time at the present day, when the powers of the Interstate Commerce Commission over the railroad companies have been so greatly increased, and especially since the power to make rates and to compel the furnishing of certain facilities, has been given to that body, the decision might very well have been different. It it had been, the task of effective railroad regulation would have been greatly simplified.

Under the new State Public Utility Acts, the very reasonable idea that where everything is regulated by the State, competition ceases to be controlling in importance, is beginning to make its way.

The Supreme Court of Illinois, in the case of *State Public Utilities Commission* v. *Romberg,* 114 N. E. 191, P. U. R. 1917 B 355, 275 Ill. 432 (1916), recently held that under Section 27 of the Illinois Public Utilities Act, (Hurd's Stat. 1916, p. 2027) a public utility, upon obtaining the consent and approval of the Commission, has the right to obtain control of a competing public utility through the purchase of stock, bonds and other evidences of indebtedness.

In *Ex parte City of Birmingham,* (1917), 74 So. 51, the Supreme Court of Alabama held that the act of the Public Service Commission of that State, in assenting to a transfer of the franchise of a street railway, although it effected a consolidation of parallel and competing lines, is not in violation of Section 103 of the Alabama Constitution which requires that the Legislature provide by law for the regulation, prohibition or reasonable restraint of common carriers * * * trusts, monopolies, to prevent them from making scarce articles of necessity, etc., or prevent reasonable competition. At page 55 of the report, the Court says:

> "We take it that the reasonableness of the competition which the Constitution intends to conserve depends on its effect upon the public interests, whether or not it makes reasonable the cost of the commodity furnished to the consumer. Competition in some circumstances may amount to needless economic waste in the duplication of investments and the cost of operation for which in the end the consuming public must pay. Hence a general drift of public opinion and legislative practice, consonant with the language and purpose of section 103, towards the supplanting of competition by the regulation of rates."

In the case of *Cumberland Telephone & Telegraph Company* v. *State,* (1911), 99 Miss. 1, 54 So. 446, the Supreme Court of Mississippi held that in those matters which are directly and specifically dealt with by the laws relating to public utilities, subjecting them to the supervision of the Railroad Commission, the anti-trust laws of the State have no application; a simple, straight-forward solution of a problem which, when solved in any other way, has resulted in much confusion and obscurity.

Even in the halls of Congess, where the Sherman Act has been the Ark of the Covenant, the evidence of a more intelligent appreciation of the real situation is not lacking.

In The Shipping & Navigation Act of September 7, 1916, it is provided by Section 15, as follows:

> "That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation, rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or co-operative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.
>
> The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.
>
> Agreements existing at the time of the organization of the board shall be lawful until disapproval by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.
>
> All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification or cancellation.
>
> Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlaw-

ful restraints and monopolies,' and amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action."

This is constructive legislation based upon business experience and I venture to think it will be found ample for the protection of the public.

The great democracies of Australia and Canada, indeed the "crowned republic" of England, have distanced us in their legislation upon the subject of railroad regulation.

In the Interstate Commission Act, 1912, of the Commonwealth of Australia, instead of our extraordinary muddle of Federal and State authorities in conflict, we find the Interstate Commission is given judicial power as a Court of Record, as follows:

> "The Commission shall have jurisdiction to hear and determine any complaint, dispute, or question, and to adjudicate upon any matter arising as to —(a) any preference, advantage, prejudice, disadvantage, or discrimination given or made by any State or by any State Authority or by any common carrier in contravention of this Act, or of the provisions of the Constitution relating to trade and commerce or any law made thereunder; (b) the justice or reasonableness of any rate in respect of interstate commerce, or affecting such commerce: (c) anything done or omitted to be done by any State or by any State Authority or by any common carrier or by any person in contravention of this Act, or of the provisions of the constitution relating to trade or commerce or any law made thereunder."[7]

The provisions of the Australian Interstate Commission Act, 1912, will be found at page 756 of the work just cited. Section 19—(1) is as follows:

> "It shall not be lawful for any State, or for any State Railway Authority, to give or make upon any railway the property

[7] Trust Laws & Unfair Competition, Washington Gov. Printing Office, 1916, p. 248.

> of the State, in respect of inter-state commerce, or so as to affect such commerce, and preference or discrimination which is undue and unreasonable, or unjust to any State."[8]

Section 27 reads as follows:

> "The Commission may of its own motion summon before it any State authority, common carrier, or person whom it has reason to believe has done anything or left anything undone in contravention of this Act, or of the provisions of the Constitution relating to trade and commerce or any law made thereunder, and shall have jurisdiction to hear and determine the matter and may make such orders in relation thereto as if complaint had been made to it of the contravention."[9]

Turning to the subject of railroad combinations in Canada, under the Railway Act of 1903, (3 Edward VII, chap. 58), the purchasing or leasing of railways must be approved by the Governor General, (sec. 281).[10]

In England, combinations between railroad companies must receive the approval of the court of the Railway and Canal Commission.[11]

The outbreak of the war with Germany created an appreciation of the necessity of an increased efficiency if the railroads of the counry would handle its business at all. August 10, 1917, Congress passed an Act to amend the Act to regulate commerce, as amended, and for other purposes, by which the President was authorized, if he found it necessary for the National defense and security, to direct that such traffic or such shipments of commodities as, in his judgment, might be essential to the national defense and security, have preference or priority in transportation by any common carrier, and he was allowed to act through such person or persons as he might designate for the purpose, or through the Interstate Commerce Commission, disobedience of orders being punishable by a fine of not more than $5,000.00 or imprisonment for not more than one year, or both, in the discretion of the court, carriers complying with such order or direction for preference or priority being exempt from all liabilities in so doing.

Even before this Act became effective, the railroads of the country had voluntarily established the Railroads' War Board of five men, of which Mr. Fairfax Harrison, President of the Southern

[8] Page 760.
[9] Page 761.
[10] Trust Laws & Unfair Competition, p. 242.
[11] Trust Laws & Unfair Competition, p. 238.

Railway Company, was Chairman, and had begun to operate the railroads of the country as if they were one system, so far as carrying freight was concerned. The result of this arrangement was an enormous increase in the freight carrying record of American railroads. With an increase of only ½ of 1% of locomotives in service, and of only 1.6% of the number of freight cars, over 16% more freight was handled in May, 1917, than in May, 1916. Preference was at once given to the movement of coal and iron ore. An agreement by which all shippers of tidewater coal pooled their coal at the ports of New York, Philadelphia, Baltimore and Hampton Roads, resulted in a saving, it is estimated, of 133,000 freight cars. A similar arrangement was made effective at ports on the Great Lakes. By one order 36 American railroads were required to move immediately 68,815 empty freight cars to the lines of 54 other railroads.

One of the first official acts after the enactment of the Preference Act, just referred to, ordered preference in the movement of coal to the Northwest, in order to make sure that that section of the country would be sufficiently supplied for the coming winter.

Another interesting development of the operation of the railroads as a continental system was the arrangement by which export traffic was diverted from congested ports on the North Atlantic to the South Atlantic and Gulf ports. Here we have a result of the greatest value which could not be obtained at all in times of peace. When we bear in mind that there are 693 railroads in this country, and that they voluntarily merged their activities for the period of the war by uniting into one continental system, one is filled with admiration of the business sagacity and patriotism which made such a solution possible. During the first four months of the Railroads' War Board, car shortage was reduced 70%; by the elimination of passenger trains not essential to the most pressing needs of the country, approximately 20,000,000 miles of train service per year were saved and the reduction of passenger service released hundreds of locomotives and train crews and cleared thousands of miles of track needed for the transportation of necessaries. Empty cars were moved from one railroad to another, irrespective of ownership; the movement of grain for export was regulated so as to avoid delays and blocking of facilities at grain elevators and seaports; indeed the enormously increased traffic due to the war was handled with a skill and success never before approximated in the work of the railroads of the country.

One of the most interesting results of the operation of the railroads as a unit was the reduction of what is known as "car shortage." The net shortage of all the roads May 1st, 1917, was 148,627 cars, but by July 1st, it had fallen to 105,782 cars, and by August 1st to 33,776 cars. By car shortage is meant the excess of unfilled car requisitions, and it is unfortunately true that a shipper will frequently make requisitions for more cars than he could possibly use; sometimes he will make requisitions for the same cars from several different railroads at the same time. These figures, nevertheless argue the most efficient railroading the United States had ever had, and the result is all the more astounding when it was made effective in the face of from 15 to 20 per cent. more traffic than was handled the previous year at the same time, when in fact there were less cars to be used for handling it. The railroads of the country had on June 30, 1916, 29,299 less freight cars than on June 30, 1915, and 1,237 less locomotives, and it is probable that in the following year there was a still further decrease. The pledge made by the highest railroad officers was:

> "with the government of the United States, and with the government of the several states, and one with another, that during the present war they will co-ordinate their operations in a continental railway system, merging, during such period, all their merely individual and competitive activities in the effort to produce a maximum of national transportation efficiency."

In September, 1917, the rule was put into effect that any box car when unloaded might immediately be reloaded for movement from any railway point to any point in the United States, regardless of the ownership of the car. This is, of course, nothing more or less than pooling the cars. It was estimated that the movement of freight cars in the Chicago District would be expedited 15% as a result, and taking the country as a whole, in effect it added many thousands to the number of cars available for service.

On November 24, 1917, without regard to the prohibition of pooling contained in the Interstate Commerce Act, under the direction of the War Board, steps were taken to operate the railroads north of the Ohio and Potomac, and east of the Mississippi, as if they were one line, to the extent of pooling their tracks and terminals, as well as their cars and locomotives, so as to operate them as a single system in every particular.

By the action of the Railroads' War Board on November 24th, 1917, 65,000 miles of track with 1,194,000 cars and 677,000 employees, were operated as one system and the congestion was relieved by diversion and routing of freight so as to use all facilities to the best advantage. It was obviously impossible for justice to be

done unless the earnings of these properties were pooled in some way as the railroads which carry the freight will make money, and the railroads which carry the passengers will lose it. Obviously also the railroads rendered themselves liable for not obeying the routing instructions of shippers, as they are required to do under the Interstate Commerce Act.

At the meeting beginning October 16, 1917, of the National Association of Railway Commissioners, its President, Hon. Max Thelen of California said in his opening address:

> "The railroad problem in the United States has permanently moved beyond the ownership and operation of the railroads as disconnected entities by private companies. The issue now and hereafter is an issue between consolidated operation of our railroads in private ownership and the unified operation directly by the people through government ownership. National exigency, lofty patriotism, and perhaps a realization that government operation was immediately impending unless private operation met the emergency, prompted the railroads of the United States, immediately after the declaration of war, to operate as a single consolidated American system and in doing so to eliminate a portion of the waste and inefficiency which were pointed out by the Interstate Commerce Commission in the five per cent. advance rate case and which for years have been recognized and commented upon by state railroad commissioners and other students of raiload problems. But what is now being accomplished is only a small part of what must be done if our railroads are to measure up to our new standards of national efficiency."

At this meeting the special committee on public ownership and operation of the National Association of Railroad Commissioners, after commenting upon the situation, put the question in so many words, "Why should we not have a maximum of transportation efficiency in peace as well as in war?"

President Rea of the Pennsylvania recently stated:

> "No less than 2,385 separate railroad corporations report to the Interstate Commerce Commission and I hazard the guess that at least 2,300 of them could be merged into the bigger systems with vast benefit to the public and everyone else concerned."

He also said that in his judgment the pooling of traffic by the railroads is essential for the public service and should be affirmatively legalized, not only for the period of the war, but for all time. He

added his belief that the restrictions of the Sherman law should not apply to the railroads, and that mergers and combinations intended to increase efficiency, simplify accounting and eliminate the wastes of competition, should not only be countenanced but encouraged, under public supervision and control.

The Traffic Director of the United States Shipping Board in September, 1917, sent a memorandum to the tug owners serving the North Atlantic ports, for the purpose of pooling all of the tugs under one control. The memorandum indicated the possibility of an enormous increase of efficiency, if the operation of the service were delegated to a single head.

The Shipping Board on September 27, 1917, approved plans for this combination of New England coal barges and ocean going tugs.

A peculiar feature of the last annual report of the Interstate Commerce Commission is that they again renew their recommendation to Congress that under the Panama Canal Act the Commission be empowered to permit, subject to further order of the Commission, continued operation by a railway, or under railway control, of water lines or vessels where it will be in the interest of the people and of convenience to the public, even though such operation may reduce competition on the route by water. It was bad enough to have to ask for such authority at all, much less ask for it twice.

In a special report of the Interstate Commerce Commission to the Senate and House of Representatives, dated December 1, 1917, the majority of the Commission suggested as an alternative to Government operation that the restrictions of the anti-trust laws, and of the provision of the Interstate Commerce Act which forbids pooling, be removed for the duration of the war. Several passages of this report were significant. They say, speaking of competition between railroads:

> "Since the Hepburn Act, and especially since the Mann-Elkins Act, the prescription by this Commission of reasonable maximum rates and charges for rail carriers subject to the Act, and the exercise of its power to require abatement of unjust discrimination or undue prejudice, have in great degree restricted that competition to the field of service. But whether or not perpetuation of the competitive influence is desirable under a system of government regulation, etc."

The only limitation they recommended upon the suspension of the operation of the anti-trust laws is in respect to consolidations or mergers of parallel and competing lines. No exception is recommended to the suspension of the anti-pooling provision of Section

5 of the Interstate Commerce Act. The dissenting opinion of Commissioner McChord recommended that the railroads be taken over at once by the Government, acting through the President, under authority of the Act of Congress of August 29, 1916, and in the event that the President did not elect to take over the railroads, that the regulation the railroad operations then vested in the several agencies of the United States Government should be promptly centralized by Act of Congress under a single governmental administrative control. Commissioner McChord pointed out that the diversified control under which the carriers had been acting since the war had done much to impede the movement of freight. The indiscriminate and excessive use by government officials of directions for priority of movement of cars had in fact created an impossible situation. The break-down of the existing system of railroad regulation was at hand.

Apparently the storm finally broke because of the anti-pooling clause of the Interstate Commerce Act. In President Wilson's statement to the Associated Press of December 27, 1917, in taking over the railroads, he says:

> "Complete unity of administration in the present circumstances involves upon occasion and at many points a serious dislocation of earnings, and the committee [referring to the Committee of Railway Executives who had been co-operating with the Government] was, of course, without power or authority to rearrange charges or effect proper compensation and adjustments of earnings. Several roads which were willingly and with admirable public spirit accepting the orders of the Committee have already suffered from these circumstances and should not be required to suffer further."

In fact the railroads were bound up in such a Gordian knot of bad laws that the President had to wield the knife like another Alexander. The prospects of inducing Congress and the State Legislatures to repeal these laws might have well appalled the stoutest heart. Too many political careers have been founded upon tying the railroads tight. The war power of the Government, which was found equal to freeing the slave without paying any compensation to his master, was equal to seizing all the railroads of the country in advance of any arrangement being made for the compensation of the owners. The spirit of the President's proclamation and statement breathes the highest patriotism and justice, and Congress has met the railroad situation with a very creditable statute. But if the Director General of Railroads is bound to obey all the existing railroad laws, and in this connection State laws and orders regulating

intra-state commerce are very important, the railroads might almost as well be given back to their owners. Orders have already been issued to disregard the routing of freight by shippers whenever necessary, and already, upon the request of the Director General, the Interstate Commerce Commission has doubled demurrage charges for not unloading cars—something for which the railroad companies could have hardly hoped on their own initiative. May we not expect that necessary increases of rates long denied to the carriers, will now be granted to the Government?

At the time of our recent troubles with Mexico the country witnessed the breakdown, for lack of efficiency, of the National Guard system, and saw the necessity for unified Federal control in order to get an efficient army. The same kind of a situation until recently existed in the American railroad world. There was a regular army in the form of the Interstate Commerce Commission and its staff, and a National Guard in each State in the form of a State Commission, operating independently. Just as the Nation found by actual experience that it was necessary to have a unified and National control for the troops of the United States, in the same way it has been shown by actual experience that a unified National control is necessary for the railroads. It is more than a generation ago that experience taught that there should be a unified central control of banking. Beginning with the National banking system, this National control has been strengthened and developed until we now have the Federal Reserve Board. Even earlier than this, the shifting of control of the improvement of rivers and harbors was made from the States to the Nation. The railroads desire nothing more than that the Nation should apply to them the same unified control which has been found necessary in so many other instances.

In the case of *City of Montreal* v. *Montreal Street Railway*, A. C. (1912) 333, it was held by the English Privy Council that a railway wholly situated in one Province, and which had not been declared by the Dominion Parliament to be a work for the general advantage of Canada, remained subject to the regulation of the Provincial Parliament only. Otherwise, said Lord Atkinson,

> "the line itself is placed in this unfortunate position, that its local traffic is put under the jurisdiction and control of the provincial Legislature and the officials of the local Government, and its through traffic, with all these other matters, is subjected to the jurisdiction and control of the Dominion Legislature and the officials of the Dominion Government. A most unworkable and embarrassing arrangement."

It is interesting to observe that this arrangement, which the distinguished Judge declared to be "most unworkable and embarrassing" is the very one which in times of peace exists throughout the United States. In Canada the regulation of commerce by the Dominion Government is not subject to impediment by Provincial authorities.

The total number of regulating authorities in the United States, exclusive of municipalities, (which frequently become very important, as for example when they require the removal of grade crossings, or electrification of tracks within city limits), is 96. The two Federal agencies are, first, Congress, and secondly, the Interstate Commerce Commission, while the 94 State agencies are 48 State Legislatures and 46 State Commissions. To take, for example, a railroad system which is not one of the largest, the Illinois Central Railroad Company is regulated by Congress, the Interstate Commerce Commission, 12 State Legislatures and 12 State Railroad Commissions. The issue of its securities is controlled by 2 State Commissions, whose laws do not agree with each other, while the requirements of the City of Chicago in the matter of track elevation and electrification make its City Council as important to the railroad system as a whole as a State Legislature or Railroad Commission would be.

As an illustration of the intensely local spirit in which State Commissions sometimes deal with questions of national importance, in an article by Mr. T. J. Norton, in the Traffic World of August 11, 1917,[12] he says:

> "In the western advance case of 1915, the Interstate Commerce Commission permitted the carriers to increase the minimum load of flour and other grain products moving interstate to 40,000 pounds over a wide extent of territory, embracing most of fourteen states west of Indiana and the Mississippi River. But in the course of two years the carriers have been able to get that minimum of 40,000 granted in only one state. Just a few days ago the state of Kansas, which has compelled the carriers to haul a load of only 24,000 pounds of flour and other grain products, denied their application for an advance to what the Interstate Commerce Commission had found to be a fair-sized load, notwithstanding that it appeared in the western advance case that the average equipment would carry about 60,000 pounds and that flour for export loads from 70,000 to 85,000. * * *

[12] Vol. 20, p. 237.

> On account of the interference with interstate commerce by state regulating bodies the Atchison, Topeka & Santa Fe Railway Company last year employed not less than 14,000 cars more than were necessary in the transportation of flour and other grain products alone. A like stupendous waste for only one carrier on only one commodity is suffered by all carriers as to grain and grain products and also as to other commodities in varying degrees."

In December, 1917, the Interstate Commerce Commission was compelled to make an order to put an end to the discrimination produced by an order of the Public Service Commission of Missouri, creating a preference in favor of stock yards in St. Louis, Missouri, over those in East St. Louis, Illinois, on shipments of cattle originating in Missouri.[13] Human nature is the great constant, and the only way to stop wrong-doing is to make it unprofitable.

In October, 1917, the Chamber of Commerce of the United States took a referendum in regard to the subject of railroad regulation. The questions submitted by the Committee and the result of the balloting were as follows:

I. The Committee recommends that provision be made for federal regulation of the issuance of railroad securities.
1112½ votes in favor.
27½ votes opposed.

II. The Committee recommends that Congress pass a general railroad incorporation law under which all railroad carriers subject to the jurisdiction of the Interstate Commerce Commission may organize.
1111½ votes in favor.
25½ votes opposed.

III. The Committee recommends that if Congress passes a railroad incorporation law, all railroad carriers subject to the jurisdiction of the Interstate Commerce Commission, both those now existing and those hereafter to be created, be required to organize under this law.
1080½ votes in favor.
49½ votes opposed.

[13] *Dimmitt-Candle-Smith Live Stock Commission Co. v. C. B. & Q. R. R. Co. et al.*, 20 Traffic World, 1259.

IV. In view of the fact that conflict has arisen with respect to the jurisdiction of the Interstate Commerce Commission over intrastate rates, even though such rates affect interstate commerce—the Committee recommends that the Commission be given authority by statute to regulate intrastate rates when those rates affect interstate commerce.
1054½ votes in favor.
66½ votes opposed.

It has been estimated recently by competent authority that American railroads, which consist of more than 250,000 miles of single track, represent a property investment of about $17,000,000,000, and that, either directly by stock ownership, or indirectly through insurance companies, savings banks, charitable institutions, banks and trust companies, half the people of the United States are interested in railroad securities. Investments in the stocks of railroad companies have drifted out of the hands of magnates into those of small investors. For example, nearly half the stockholders of the New Haven do not hold over ten shares of stock, and in that company, as in the Pennsylvania, nearly as many women are stockholders as men. The Pennsylvania has 94,000 stockholders; the Atchison 45,000; the Illinois Central 10,000. When the railroads starve, many people go hungry. This situation, however, makes little impression on the popular mind, for the things which are seen are politics and the things which are not seen are economics.

In the greater portion of the United States railroad property will always receive comparatively bad treatment, because it is owned by non-residents. It is a matter of common observation that the taxes of non-residents are always higher than those of persons who are on the spot and able to take care of themselves. This is human nature. Money paid to railroad companies has the same bad aspect as rent sent off to non-resident owners. The clamor and outcry of railroad companies against injustice in most localities of the United States is like that of a man situated a great way off, and whose voice travels slowly. In most of the States of the Country, railroads are to all intents and purposes non-residents, and in regulation by such States they are treated accordingly. In regulation by the Nation as a whole, however, those localities, for the most part east of the Hudson River, where railroad stocks are largely held, have also a voice. The owners of the railroads are not non-residents of the Nation as a whole. For this reason, if for no other, National regulatin will always be fairer than that of all except a comparatively few of the States, and the quality of the justice administered by the

Nation will always be superior to that administered by all except a comparatively small number of the States, so far as railroad companies are concerned. Constitutional limitations, whether of the State or of the Nation, are an inadequate protection to the railroad industry. The growth and development of the railroads of the country can be, indeed it now is, effectively stopped without the violation of a single constitutional limitation. A situation where one who invests new capital in railroads cannot earn more than the rate of interest, but may lose a part or all of the interest, or even of the principal itself, will effectively stop the building of additional lines. The only protection upon which the railroads can really count is the economic law that people will not invest in securities which do not promise a safe and adequate return. We have now reached a situation in this country when, taking the railroads as a whole, they have ceased to be attractive fields for the investment of new capital. The people of the United States ought to be concerned about this situation. There are only two remedies for it, either the railroads must be allowed to earn enough to keep attracting the capital necessary for the development of the business, or the Government itself must build the additional railroads and facilities which the growth of the country and of its business require. Indeed, since the President took over the railroads at the close of 1917, only the latter alternative remains, for the present. It is clear as never before that the interests of the whole people require that the railroad industry should be placed permanently upon a prosperous basis, not only during the present war but after.

The conclusion of the whole matter is that such things as experience during the war has shown to be for the benefit of the public as well as of the railroad companies should be lawful when the war is over; that the public should not be deprived of the advantages which have been made manifest by unification for service of the railroads of the country; and that such statutes as forbid the continuance of an arrangement so excellent and so sensible from every point of view, should be repealed or modified so as to permit a continuance of present conditions, so far as they are of advantage to the people as a whole.

One of the greatest dangers of the present situation is that while the Government is in control of the railroads without a fully corresponding increase of rates, it will raise the wages of labor to such an extent that their owners cannot afford to operate them upon the conditions which will exist at the close of the war. In England it is estimated that the increased wages paid to labor alone will wipe out

all the profits of the railroad companies upon the basis of earnings now existing.[14] The English Government has raised the rates very little, and the enormous burden of increased operating expenses has fallen upon the English people in taxes. If such a condition should arise here, the owners of the properties would find themselves ruined in advance, when they took their properties back, for they could count upon the fierce resistance of the shippers to any increase of rates, and the sympathy of the regulating bodies with the shippers in that position. And who will reduce wages? Without an adequate increase of rates, private ownership is a ruinous program.

In "China: An Interpretation," written several years ago by James W. Bashford, Bishop of the Methodist Episcopal Church resident in China[15] occurs the following passage:

> "May 9, 1911, the government proclaimed its policy for the nationalization of the railways of China. An illustration of the irony of history is found in the fact that in the technical struggle over which the revolution finally broke, Prince Chun was in the right and the liberals were in the wrong. This technical struggle was over the question whether the railways should be under the control of the central government or under the control of the various provincial governments. Prince Chun stood for a national ideal as over against the ideal of provincial supremacy, while the provincial authorities, suffering from the despotism of preceding centuries, struggled for provincial control. Every American can see how dangerous, especially in time of war, would be forty-eight systems of American railways, each under a state, rather than under national control. Surely, if China is to protect herself against foreign aggression, she must have, as speedily as possible, a system of railways extending throughout the nation and under national control, by which she can move her troops quickly to any point where danger threatens. The whole political history of the nineteenth century may be summed up in a movement toward nationalism as over against state rights, or the rights of petty independent kingdoms. In this last struggle Prince Chun placed himself in line with great statesmen of the modern world."

President Wilson has also placed himself in line. The situation at this hour is full of hope. It is not beyond the reach of human

[14] See article, "The Railways of Great Britain After the War," 64 Railway Age, 169, taken from *The Engineer*, London, November 30, 1917.

[15] Page 347 note.

possibility that the actual demonstration of the advantage of combination instead of competition, will lead to a change of the entire policy of the American people towards the railroads.

The Act of Congress of March 21, 1918, in making provision by Section 10 that during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations and practices, by filing the same with the Interstate Commerce Commission, providing further that the Commission shall have no power to suspend them, pending final determination, but that the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of the order, expressly provides:

> "In determining any question concerning such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition."

It is interesting to observe that the powers of the President are not restricted to interstate rates, and that either the Interstate Commerce Commission is granted the power to review intrastate rates initiated by the President, or there is no provision made to review such intrastate rates at all. There is no constitutional difficulty in power being conferred upon the Interstate Commerce Commission to review intrastate rates, whether such legislation be based upon the war power or upon the power to regulate foreign and interstate commerce.

> "If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of regulation it should apply."[16]

The effect of combination of railroads under the rule of the Director General has shown itself at once in a remarkable series of re-

[16] *Simpson* v. *Shepard*, (1913), 230 U. S. 352, 432-3.

forms. Ports, terminals, locomotives, rolling stock and other transportation facilities, have been utilized without regard to ownership; the designation of routes by shippers has been disregarded in the public interest; new through routes for traffic have been established; traffic agreements have not been allowed to interfere with expedition. Demurrage charges have been increased upon cars so as to minimize their detention for loading and unloading; new construction has been limited to the minimum required by National necessities; ticket offices have been consolidated; advertising and solicitation of traffic have been discontinued; the amount of free transportation has been reduced; the use of universal inter-line way-billing and standard forms has been introduced; an uniform rule has been established in regard to the construction of new industry tracks; an order has been made that suits against carriers while under Federal control must be brought in the County or District where the plaintiff resides, or in the County or District where the cause of action arose, otherwise it is expected that no provision will be made by the Government for satisfying judgments obtained in such suits. The lines of steamships serving the Atlantic Coast have also been taken over by the Director General and are expected to be operated in connection with the railroads. Arrangements have been made to unify the purchase of materials and supplies for all the railroads by the Government. The Government has under consideration the discontinuance of fire insurance, the Government itself bearing the risk. An increase of rates has been granted in Trunk Line territory, and further increases of rates in other parts of the country are expected; it is believed that the attitude of the Interstate Commerce Commission will be more favorable to such increases than heretofore. Superfluous passenger trains have been eliminated and their schedules arranged so as to accommodate the passengers better in the choice of time of departure, and further improvements along these lines are in contemplation. The designs for locomotives and cars have been standardized. The three different classifications used in freight service in different parts of the country are expected to be harmonized at an early day. Unnecessary associations of carriers are in the process of being abolished. An end is to be made to the cross-hauling of coal, by compelling the shippers to buy from miners in their own field. In short, the Director General is earnestly endeavoring to secure the economies of combination, and is making considerable progress.

Can it be believed that the American people will ever return to the régime of enforced competition of carriers, or even consent to the

conduct of the railroad business on a competitive basis? This does not necessarily mean Government ownership,[17] but it means at least a sweeping reform in the system of railroad regulation which prevailed before the President's Proclamation of December 26, 1917.

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Chicago.

[17] A concise discussion of "What Government Ownership Would Mean," by Mr. Samuel O. Dunn, will be found in Volume 64, No. 14, page 831, of the "Railway Age". Mr. Dunn concludes that after the war, private ownership under a more rational system of regulation would be better than government ownership, but "to return the railways to their owners after the war subject to the kind of regulation which has prevailed would be disasterous to both the companies and the country." In this article Mr. Dunn questions the expediency of the President's having assumed such complete control of operation of the railroads. The legality of the President's Proclamation of December 26, 1917, is questioned by District Judge Evans in *Muir* v. *L. & N. R. R. Co.* (March 2, 1918), 247 Fed. 888. The Act of Congress of March 21, 1918, entitled "An act to provide for the operation of transportation systems while under Federal Control, for the just compensation of their owners and for other purposes" would however be very curative.

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